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No. 77-1798

In the Supreme Court of the United States

OCTOBER TERM, 1978

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL., PETITIONERS

v.

DOUGLAS COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 571 F. 2d 359. The opinion of the Administrator of the Environmental Protection Agency (Pet. App. 36-39) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978. A petition for rehearing was denied on March 20, 1978. The petition for a writ of certiorari was filed on June 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Public Law 89-298,[1] which authorized construction of the Burns Waterway Harbor, requires the Administrator of the Environmental Protection Agency to include in a discharge permit issued to the Northern Indiana Public Service Company effluent limitations more stringent than those required by Section 301(b)(1) of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311(b)(1).

STATUTES INVOLVED

The relevant portions of Public Law 89-298 (79 Stat. 1091) are set forth at Pet. 13a-14a. The relevant portion of Section 301 of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311, is set forth at Pet. 12a.

STATEMENT

On October 31, 1974, pursuant to Section 402 of the Federal Water Pollution Control Act (FWPCA), as added, 86 Stat. 880, 33 U.S.C. (Supp. V) 1342, the regional office of the Environmental Protection Agency (EPA) issued a National Pollutant Discharge Elimination System (NPDES) permit to the Northern Indiana Public Service Company (NIPSCO) for its coal-fired Bailly generating station adjacent to Burns Harbor, Indiana (Pet. App. 2). The permit required NIPSCO to meet certain effluent limitations and other special conditions. NIPSCO then requested an adjudicatory hearing on certain questions regarding the permit, and petitioners requested and were granted party status for the hearing (Pet. App. 3).

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[1]The Act of October 27, 1965, 79 Stat. 1073. Because petitioners and the court of appeals refer to this Act as Public Law 89-298, we do the same to avoid confusion.

Pursuant to 40 C.F.R. 125.36(m), the officer presiding at the hearing certified to the General Counsel of EPA the question whether Public Law 89-298, which authorized the construction of the Burns Waterway Harbor on the shore of Lake Michigan, should have been applied to affect the effluent limitations in the NIPSCO permit. Section 301 of Public Law 89-298[2] provides in pertinent part:

> The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor.

The General Counsel concluded that Public Law 89-298 was not applicable to the effluent limitations in NIPSCO's permit (Pet. App. 22-35). Petitioners filed a petition seeking review by the Administrator of EPA, who concluded that "the relevant terms of Public Law 89-298 permit no reasonable construction other than that reached in the [General Counsel's] Decision" (Pet. App. 38-39). Accordingly, the Administrator denied the petition (Pet. App. 39).

The parties to the adjudicatory hearing then entered into a stipulation that resolved factual issues and preserved legal questions pertaining to Public Law 89-298 (Pet. App. 5). On December 7, 1976, in accordance with the stipulation, EPA issued a permit to NIPSCO superseding the 1974 permit (Pet. App. 40-56).

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[2]79 Stat. 1091.

Pursuant to Section 509(b)(1)(F) of the Federal Water Pollution Control Act, as added, 86 Stat. 891, 33 U.S.C. (Supp. V) 1369(b)(1)(F), petitioners sought review of the Administrator's issuance of the NIPSCO permit in the court of appeals.[3] After consideration of Public Law 89-298 and the applicable legislative history, the court concluded that the Act imposed no limitations on the NIPSCO permit. The court pointed out that "the public law does not articulate any specific standard" but "voices only a broadly stated objective, which gives the Secretary of the Army authority to exercise his discretion in obtaining assurances from Indiana of 'maximum feasible' pollution control in Burns Harbor" (Pet. App. 13).

The court also noted that the Public Law's directive to obtain assurances from the State was addressed to the Secretary of the Army, not to the Administrator of EPA (Pet. App. 10). Moreover, the Secretary was not authorized to promulgate standards, but only to seek assurances from the State (*ibid.*). The court concluded that the Secretary had received such assurances, and thus that Public Law 89-298 required nothing more (*id.* at 13-14). Finally, the court also noted that even if EPA were required to apply Public Law 89-298 in issuing the NIPSCO permit, petitioners still would not be entitled to relief, since they had made no showing that any requirements based on the Public Law would be more stringent than those already applied under the FWPCA (*id.* at 16-18). Accordingly, the court dismissed the petition and affirmed the Administrator's decision (*id.* at 18).

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[3]Petitioners also sought review of the Administrator's decision upholding the General Counsel's determination, and the two petitions were consolidated for review; the court concluded that it was unnecessary to consider whether the petition to review the Administrator's earlier decision was permature, since the court had jurisdiction to review the issuance of the permit (Pet. App. 5).

ARGUMENT

1. Petitioners contend (Pet. 10-11) that the court of appeals erred in interpreting the objective of "maximum extent feasible" in Public Law 89-298 as no more stringent than the standard "best practicable control technology currently available" in Section 301(b)(1)(A) of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311(b)(1)(A). Petitioners urge that the interpretation of a technical standard is an administrative function within the expertise of EPA, and they seek a remand to require the EPA to interpret the provision in Public Law 89-298.

This argument is without merit. The portion of the court's opinion in which petitioners contend that the court interpreted the statutory objective "maximum extent feasible" follows the court's holding that Public Law 89-298 imposes no standards applicable to the NIPSCO permits. In dictum the court noted (Pet. App. 16) that even "[i]f we assume arguendo" that the Public Law was applicable, the result would be the same. This hypothetical argument was not necessary to the court's decision, and it neither requires a remand to the EPA nor warrants review by the Court.

2. Petitioners also contend (Pet. 11-12) that the court of appeals' decision rests on the erroneous premise that Public Law 89-298 was to be enforced by the Secretary of the Army, not the Administrator of EPA. Petitioners urge that Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. V) 1342, designated the Administrator of EPA as the exclusive authority to issue permits for discharges into navigable waters, transferring to him the authority formerly exercised by the Secretary of the Army under Section 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407.

This argument is insubstantial. Congress's transfer of certain environmental protection functions from the Secretary of the Army to the Administrator of EPA did not alter the terms of Public Law 89-298. As the court of appeals correctly concluded, the Public Law expressly directed the Secretary of the Army, who was responsible for the construction of the Burns Waterway Harbor, to obtain certain assurances from State authorities regarding the control of pollution that might affect nearby recreational areas. Public Law 89-298 did not require EPA to include more stringent limitations in discharge permits issued pursuant to the Federal Water Pollution Control Act.

3. The court of appeals construed a narrow statutory provision applicable only to a single harbor construction project. The court's decision was correct, and it presents no issue of general importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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